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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE DISTRICT OF ARIZONA

7 Jim Munene,

8 Plaintiff,

9 vs.

10
11 Alejandro Mayorkas, Secretary,
12 Department of Homeland Security,

13 Defendant.

No. CV 19-220 TUC RM (LAB)

ORDER

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15 Pending before the court is the plaintiff's motion to amend, filed on August 5, 2021.
16 (Doc. 37) The defendant filed a response on September 30, 2021. (Doc. 46) The plaintiff
17 filed a reply on October 6, 2021. (Doc. 49)

18 The plaintiff in this action, Jim Munene, claims his employer, the Department of
19 Homeland Security, discriminated against him because of his race, color, and national origin
20 in violation of Title VII of the Civil Rights Act of 1964 when he failed to receive a
21 performance award for the fiscal year 2014. (Doc. 1, p. 5) The defendant identifies this
22 claim by its Equal Employment Opportunity Commission (EEOC) administrative number
23 HS-CBP-02626-2015. (Doc. 46, p. 3)

24 On August 5, 2021, Munene filed what is labeled a First Amended Complaint. (Doc.
25 37) The court construes the filing as a motion to amend pursuant to Fed.R.Civ.P. 15. (Doc.
26 39) Munene seeks to expand his complaint to encompass additional adverse employment
27 actions dating from July 17, 2012 to the present. (Doc. 37, p. 4) He also seeks to amend his
28 cause of action citing, in addition to Title VII, the Fifth Amendment right to due process,

1 right to property, and prohibition on double jeopardy. (Doc. 37, p. 3)

2 The case has been referred to the Magistrate Judge for all pretrial matters pursuant to
3 Local Civil Rule 72.1 and 72.2. (Doc. 12)

4 The court concludes that amendment would be futile because the proposed additional
5 claims would be subject to dismissal pursuant to Fed.R.Civ.P. 12(b)(6).

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7 Discussion

8 “Once a responsive pleading has been filed, as is the case here, a party may amend the
9 party’s pleading only by leave of court or by written consent of the adverse party; and leave
10 shall be freely given when justice so requires.” *Roth v. Garcia Marquez*, 942 F.2d 617, 628
11 (9th Cir.1991) (internal punctuation removed).

12 When deciding a motion to amend, courts generally will consider the following
13 factors: “bad faith, undue delay, prejudice to the opposing party, futility of the amendment,
14 and whether the party has previously amended his pleadings.” *Bonin v. Calderon*, 59 F.3d
15 815, 845 (9th Cir. 1995). “However, each is not given equal weight.” *Id.* “Futility of
16 amendment can, by itself, justify the denial of a motion for leave to amend.” *Id.* “An
17 amended complaint is futile where it would be subject to dismissal under Rule 12(b)(6).”
18 *Reed v. Nevada*, 2021 WL 3722879, at *2 (D. Nev. 2021) (punctuation modified).

19 “Title VII of the Civil Rights Act of 1964, as amended, is the exclusive remedy for
20 federal employee race discrimination.” *Thomas v. Sec’y of The United States Dep’t of*
21 *Veterans Affs.*, 2021 WL 2593643, at *2 (C.D. Cal. 2021), report and recommendation
22 adopted, 2021 WL 2590160 (C.D. Cal. 2021). “To bring a claim of discrimination under
23 Title VII, a federal employee plaintiff must first consult a counselor prior to filing a
24 complaint, then proceed to a formal discrimination complaint with the agency’s Equal
25 Employment Opportunity (EEO) office.” *Id.* “After the EEO office issues a final decision,
26 the employee may appeal the decision to the EEOC or file a civil action in federal district
27 court.” *Id.*

1 “[O]ur case law . . . holds that substantial compliance with the presentment of
 2 discrimination complaints to an appropriate administrative agency *is* a jurisdictional
 3 prerequisite.” *Sommatino v. United States*, 255 F.3d 704, 708 (9th Cir. 2001) (emphasis in
 4 original) “[A] plaintiff must allege compliance with the mandatory processing rule in order
 5 to state a claim on which relief may be granted.” *Young v. Buttigieg*, 2021 WL 981305, at
 6 *14 (N.D. Cal. 2021).

7 Run of the mill employment disputes in the federal sector are adjudicated by the Merit
 8 Systems Protection Board (MSPB). *Sloan v. West*, 140 F.3d 1255, 1258 (9th Cir. 1998).
 9 “However, when a federal employee claims he or she has been affected by both an adverse
 10 employment action and a related Title VII violation, administrative remedies may be
 11 exhausted for Title VII purposes by asserting both claims before the MSPB.” *Id.* at 1259.

12 13 *2012 Employment Action*

14 The defendant argues first that Munene cannot amend his complaint to add the
 15 employment dispute dating from 2012, when he was suspended without pay “because he had
 16 been indicted for crimes for which a sentence of imprisonment could have been imposed,”
 17 Merit Systems Protection Board (MSPB) No. DE-0752-13-0012-I-1. (Doc. 46, p. 3)

18 On October 10, 2012, Munene appealed the suspension, but twenty days later, he
 19 moved to voluntarily withdraw his appeal with the understanding that he could file a new
 20 appeal if “the agency improperly continues his indefinite suspension beyond the date of the
 21 resolution of his criminal indictment.” (Doc. 48-2, p. 3) The Board accepted his motion and
 22 dismissed the appeal. Munene was instructed that if he was dissatisfied with the final
 23 decision of the Board, he could seek judicial review “no later than 60 calendar days after the
 24 date this initial decision becomes final [on December 5, 2012].” (Doc. 48-2, pp. 3, 5) The
 25 60 days have long since past. It would be futile to add this claim to the pending action
 26 because it would be subject to dismissal as untimely. *See, e.g., Manning v. Merit Sys. Prot.*
 27 *Bd.*, 2018 WL 10345321, at *3 (N.D. Cal. 2018) (“Because he filed his Petition sixty-three
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1 days after the MSPB issued its final order, his Petition is untimely.”), *aff’d sub nom.*
2 *Manning v. United States Dep’t of Def.*, 791 F. App’x 675 (9th Cir. 2020).

3 Munene asserts that the decision dismissing his appeal was faulty because it should
4 have said his appeal was dismissed *without* prejudice and instead it said his appeal was
5 dismissed *with* prejudice. (Doc. 49, p. 7) He maintains that this error is inconsistent with
6 the judge’s statement in the decision that “I advised the appellant that he will have the right
7 to file a new appeal in the future if he believes that the agency improperly continues his
8 indefinite suspension beyond the date of resolution of his criminal indictment.” (Doc. 49,
9 p. 8) Munene seems to be arguing that this inconsistency somehow prevented him from
10 discovering that the wording in the dismissal was error. The court, however, sees no
11 inconsistency here.

12 The decision allows Munene to file a *new* appeal if the agency continues the
13 suspension beyond the date his indictment is resolved (assuming the indictment is resolved
14 in Munene’s favor). The new appeal would challenge the agency’s decision to *continue* the
15 suspension, not its original decision to suspend Munene when the indictment first issued.
16 This is why the original appeal was dismissed with prejudice. Munene might have had
17 something different in mind when he moved to dismiss his appeal, but if he was unsatisfied
18 with the wording in the decision, he had 60 days to file an appeal. He did not do so, and on
19 this record, there appears to be nothing that the government did that prevented Munene from
20 discovering this “error” and filing a timely appeal.

21
22 *2013 Employment Actions*

23 The defendant further argues that Munene cannot amend the complaint to add the
24 employment dispute dating from 2013, EEOC No. HS-CPB-02199-2013, which was finally
25 resolved on August 14, 2017. (Doc. 48-3, p. 2) In that action, Munene argued he was
26 subject to disparate treatment and/or harassment when he received a number of adverse
27 employment actions involving overtime, computer equipment, administrative leave, etc.

1 (Doc. 48-3, pp. 7-8) The administrative judge concluded that Munene had offered no
2 evidence that “he was discriminated against on the basis of race, color or national origin or
3 retaliated against on the basis of prior EEO activity” (Doc. 48-3, p. 20) The decision,
4 dated June 7, 2019, informed Munene that he had a right to file a civil action “within ninety
5 (90) calendar days from the date you receive this decision.” (Doc. 48-4, p. 7) It appears that
6 this deadline has long since passed. It would be futile to add this claim to the pending action.

7 Munene asserts that the decision was sent to the wrong address and he did not receive
8 it until 2020. (Doc. 49, pp. 6-7) He does not state *when* in 2020 he received it, but assuming
9 he received it on December 31, 2020, the ninetieth day would have been Wednesday, March
10 31, 2021. His motion to amend the complaint was filed on August 5, 2021, well past the
11 ninetieth day. (Doc. 29); *see, e.g., Roughen v. Dep’t of Army*, 225 F.3d 663 (9th Cir. 2000)
12 (unpublished) (“Because the requirement that a federal complaint must be filed within 90
13 days of a decision of the Equal Employment Opportunity Commission (“EEOC”) is
14 jurisdictional, the district court did not err by dismissing the complaint.”).

15 The court notes that the original complaint was pending on March 31, 2021, and for
16 statute of limitation purposes, the filing date of an amended complaint can relate back to the
17 date the original complaint was filed under certain circumstances. Fed.R.Civ.P. 15(c)(1).
18 For example, relation back is allowed if “the amendment asserts a claim . . . that arose out
19 of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original
20 pleading.” Fed.R.Civ.P. 15(c)(1)(B). Here, the amended claim concerns adverse
21 employment actions involving overtime, computer equipment, administrative leave, etc.
22 EEOC No. HS-CBP-02199-2013. (Doc. 48-3, pp. 7-8) The original complaint, however,
23 concerns his failure to receive a performance award in fiscal year 2014, EEOC No. HS-CBP-
24 02626-2015. (Doc. 46, p. 3) These two claims did not arise out of the same conduct,
25 transaction, or occurrence. The “relation back” rule, therefore, does not apply. Munene does
26 not argue the contrary in his reply. (Doc. 49, pp. 6-7)

1 *2016 and 2017 Employment Actions*

2 In these actions, (EEOC No. HS-CBP-540-3032-00158X, formerly 540-2017-00337X
3 and 540-2018-00241X) Munene asserts that his “2016 annual performance appraisal” only
4 “contained an overall rating of ‘Achieved Expectations’,” he was charged with 8 hours of
5 absence without leave, his “2017 annual performance appraisal” only “contained an overall
6 rating of ‘Achieved Expectations’,” and “he became aware that he would not receive a fiscal
7 year 2017 annual performance award” (Doc. 46, p. 4) Adjudication of this matter was
8 delayed due to Munene’s posting overseas. *Id.* The process has since resumed now that he
9 is back. *Id.* Summary judgment briefing is ongoing. *Id.* The EEOC has not issued a final
10 decision yet. *Id.* Munene has not exhausted this claim administratively; it is unripe. It
11 would be futile to add this claim to the pending action.

12 The defendant candidly notes that under certain circumstances a claim becomes ripe
13 180 days after the filing date of the complaint if final agency action is not taken. (Doc. 46,
14 p. 4, n. 5); 29 C.F.R. § 1614.407(b). Munene, however, does not argue that his claim is ripe
15 under this regulation. (Doc. 49, p. 5) That may be because the delay in adjudicating the
16 claim was due to his own request to stay the proceedings while he was overseas. The 180-
17 day rule apparently is designed to apply only where the agency itself is at fault for the delay.
18 Delay that can be ascribed to the claimant does not trigger the 180-day rule. *See Bell v.*
19 *Donley*, 724 F. Supp. 2d 1, 13 (D.D.C. 2010) (“Thus, it is well-established that failure to
20 cooperate in the investigation will be equated with a failure to exhaust administrative
21 remedies, notwithstanding the passage of the 180–day time period.”).

22 In his reply, Munene clarifies that this claim is about harassment he received when he
23 was accused of losing his Personal Identification Card. (Doc. 49, p. 5) He does not dispute
24 the defendant’s argument that this claim is unripe. *Id.*

25
26 *2018 Termination*

27 The defendant further argues that Munene cannot amend his complaint to add a claim
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1 that he was improperly terminated, MSPB No. DE-0752-19-0419-I-1. (Doc. 46, p. 4)

2 On July 30, 2018, Munene filed his initial complaint with the EEO challenging his
3 termination on May 30, 2018. (Doc. 46, p. 4); (Doc. 49, p. 2) The Agency issued its final
4 decision on May 28, 2019. *Id.* Munene appealed to the EEOC, which remanded the action
5 to the Agency with instructions to reissue its decision and allow Munene a chance to file a
6 proper appeal with the MSPB. (Doc. 46, pp. 4-5) On appeal, the MSPB affirmed the
7 Agency's final decision. (Doc. 46, p. 5) Munene filed a petition for review on April 4, 2020.
8 *Id.* "To date, no final decision has issued." *Id.* The defendant argues that until the final
9 decision is issued, Munene cannot obtain judicial review. *Id.* (citing 5 U.S.C. § 7701(a)(1))
10 The court agrees that Munene cannot obtain judicial review of this issue until administrative
11 remedies are exhausted.

12 In his reply, however, Munene explains that he is not seeking judicial review of his
13 termination, MSPB No. DE-0752-19-0419-I-1, (Doc. 49, pp. 4-5); (Doc. 49-1, p. 9)
14 Instead, he is actually seeking judicial review of the intermediate appeal decision, EEOC
15 appeal No. 2019004938. (Doc. 49, p. 3)

16 As discussed above, Munene initially challenged his termination by filing an EEO
17 complaint on July 30, 2018, alleging discrimination based on race, national origin, and color
18 and alleging retaliation. (Doc. 49-1, p. 3) The Agency concluded that Munene failed to
19 prove discrimination in its decision issued May 28, 2019. *Id.*, p. 4. In accordance with the
20 advice he was given in that decision, Munene filed an appeal with the EEOC. *Id.*, p. 4.

21 In appeal No. 2019004938, the EEOC decided that, while the EEO properly
22 considered Munene's original mixed case complaint, Munene was improperly advised that
23 he could appeal the adverse agency decision to the EEOC. *Id.* He should have been told that
24 he could appeal only to the MSPB. *Id.* The EEOC ordered that the final agency decision be
25 reissued with an explanation that Munene could appeal to the MSPB, not the EEOC. *Id.*
26 This EEOC decision was issued on February 12, 2020. *Id.*, p. 7 Munene was informed that
27 he could appeal to the district court within 90 days of the date he receives the EEOC
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1 decision. *Id.*, p. 6 It appears that this deadline passed sometime in the middle of May of
2 2020.

3 Munene's motion to amend was filed on August 5, 2021. (Doc. 29) The claim is
4 time-barred. It would be futile to add this claim to the pending action.

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6 *Fifth Amendment Claims*

7 In his proposed Amended Complaint, Munene brings new claims pursuant to the Fifth
8 Amendment "right to due process," "right to property," and "prohibition on double
9 jeopardy." (Doc. 37, p. 3) The defendant argues that the pleading fails to provide factual
10 allegations sufficient to support these claims. (Doc. 46, p. 10) The court agrees.

11 To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient
12 factual matter, accepted as true, to state a claim to relief that is plausible on its face."
13 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the
14 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
15 defendant is liable for the misconduct alleged." *Id.* "Threadbare recitals of the elements of
16 a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

17 In the proposed Amended Complaint, the plaintiff does not explain what the
18 defendant, Alejandro Mayorkas, did that violated his Fifth Amendment rights. He simply
19 states without elaboration that his Fifth Amendment rights were violated. This is
20 insufficient.

21 In his reply brief, Munene asserts that his Fifth Amendment claim arises from the fact
22 that "[t]he Defendant . . . is in total defiance of the EEOC Final Decision [No. 2019004938]."
23 (Doc. 49, p. 3) He does not explain, however, what the defendant did, or did not do, in
24 defiance of that Decision. As explained above, the EEOC instructed the Agency to reissue
25 its decision affirming his termination and allow Munene the opportunity to file an appeal
26 with the MSPB. Apparently, that decision was reissued by the Agency on April 9, 2020 in
27 accordance with the EEOC order. See (Doc. 49-1, pp. 9-45); (Doc. 48-1, p. 29) The
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1 proposed Amended Complaint alleges no facts tending to show that Alejandro Mayorkas, as
2 an individual, defied the EEOC's Final Decision.

3 In the alternative, it may be that Munene names Alejandro Mayorkas, not in his
4 individual capacity, but in his official capacity as Secretary of the Department of Homeland
5 Security. If so, Munene is bringing a suit against an arm of the United States government,
6 and he faces an additional jurisdictional hurdle.

7 "It is well settled that the United States is a sovereign, and, as such, is immune from
8 suit unless it has expressly waived such immunity and consented to be sued." *Dunn & Black,*
9 *P.S. v. United States*, 492 F.3d 1084, 1087–88 (9th Cir. 2007). "Such waiver cannot be
10 implied, but must be unequivocally expressed." *Id.* at 1088. "Where a suit has not been
11 consented to by the United States, dismissal of the action is required because the existence
12 of such consent is a prerequisite for jurisdiction." *Id.* "The Supreme Court has frequently
13 held that a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in
14 favor of the sovereign." *Id.* (punctuation modified) "Unless [the plaintiff] satisfies the
15 burden of establishing that [his] action falls within an unequivocally expressed waiver of
16 sovereign immunity by Congress, it must be dismissed." *Id.*

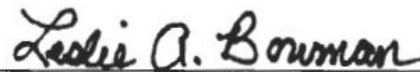
17 The proposed Amended Complaint does not "demonstrate that there are statutes of the
18 United States (1) waiving the immunity of the sovereign to be sued in an action such as that
19 sought to be maintained and (2) conferring subject matter jurisdiction upon the court before
20 which the action is brought." *Krouse v. U.S. Gov't Treasury Dep't I.R.S.*, 380 F. Supp. 219,
21 221 (C.D. Cal. 1974). Accordingly, Munene's proposed Fifth Amendment claims are subject
22 to dismissal and amendment would be futile.

23 All of the new claims included in the proposed Amended Complaint would be subject
24 to dismissal under Fed.R.Civ.P. 12(b)(6). Amendment would be futile. Accordingly,

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26 IT IS ORDERED that the plaintiff's motion to amend, filed on August 5, 2021, is
27 DENIED. (Doc. 37) The Clerk is instructed to amend the docket by changing the
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1 designation for Doc. 37 from “First Amended Complaint” to “Motion to Amend the
2 Complaint by Plaintiff Jim Munene.” The Clerk is instructed to amend the docket by
3 changing the designation for Doc. 49 indicating that it is the plaintiff’s REPLY in support
4 of his Motion to Amend the Complaint.

5 DATED this 27th day of October, 2021.

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9 Leslie A. Bowman
10 United States Magistrate Judge
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